

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 20, 1993. This rule is not a major rule as defined at 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule is not creating any new requirements or changing any existing requirements and the rule only impacts foreign contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to modify DFARS clause 252.229-7001, Tax Relief, to incorporate the information included in DFARS clause 252.229-7000, Invoices Exclusive of Taxes or Duties. Combining these clauses will result in DFARS clause 252.229-7000 being removed from the DFARS, pursuant to action taken by the Regulatory Reform Task Force.

The objective of this proposed rule is to streamline DoD contract terms and conditions and contractor responsibilities pertaining to foreign taxes and duties. The modification of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force under Executive Order 13771, “Enforcing the Regulatory Reform Agenda.”

This rule is combining two existing clauses that address the same topic into a single comprehensive clause. These clauses apply to solicitations and contracts awarded to a foreign concern for contract performance in a foreign country. This rule is not expected to impact small business entities, because

this rule only applies to foreign entities. The Small Business Administration (SBA) identifies a “small business” as “a business entity organized for profit, with a place of business located in the United States, and which operated primarily within the United States or which makes a significant contribution to the U.S. economy through the payment of taxes or use of American products, materials, or labor” (13 CFR 121.102(a)). This rule only applies to foreign contractors, which do not meet the SBA definition of “small business” entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D049) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 229 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 229 and 252 are proposed to be amended as follows:

- 1. The authority citation for 48 CFR parts 229 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 229—TAXES**229.402-1 [Removed]**

- 2. Remove section 229.402-1.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**252.229-7000 [Removed and Reserved]**

- 3. Remove and reserve section 252.229-7000.
- 4. Amend section 252.229-7001 by—
 - a. Removing the clause date “(SEP 2014)” and adding “(DATE)” in its place;
 - b. Revising paragraph (b);
 - c. In Alternate I—
 - i. Removing the clause date of “(SEP 2014)” and adding “(DATE)” in its place; and
 - ii. Revising paragraph (b).

The revisions read as follows:

252.229-7001 Tax Relief

* * * * *

(b) Invoices submitted in accordance with the terms and conditions of this contract shall be exclusive of all taxes or duties for which relief is available. The Contractor’s invoice shall list separately the gross price, amount of tax deducted, and net price charged.

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Alternate I. * * *

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(b) Invoices submitted in accordance with the terms and conditions of this contract shall be exclusive of all taxes or duties for which relief is available. The Contractor’s invoice shall list separately the gross price, amount of tax deducted, and net price charged.

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DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 227 and 252**

[Docket DARS-2019-0048]

RIN 0750-AK71

Defense Federal Acquisition Regulation Supplement: Validation of Proprietary and Technical Data (DFARS Case 2018-D069)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the

National Defense Authorization Act for Fiscal Year 2019, which amended the statutory presumption of development exclusively at private expense for commercial items in the procedures governing the validation of asserted restrictions on technical data.

DATES: Interested parties should submit written comments to the address shown below on or before November 12, 2019, to be considered in the formation of any proposed rule.

DoD is also hosting public meetings to obtain the views of interested parties in accordance with the notice published in the **Federal Register** on August 16, 2019, at 84 FR 41953.

ADDRESSES: Submit written comments identified by DFARS Case 2018–D069, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2018–D069.” Select “Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2018–D069” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2018–D069 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A–S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in Government and the private sector that will assist in the development of a revision to the DFARS to implement section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 865 repeals several years of congressional adjustments to the statutory presumption of development at private expense for commercial items in the validation procedures at paragraph (f) of 10 U.S.C. 2321.

The presumption of development funding for commercial items was

established in 1994 by section 8106 of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103–355). This statutory presumption has been amended numerous times, including by section 802(b) of the NDAA for FY 2007 (Pub. L. 109–364), section 815(a)(2) of the NDAA for FY 2008 (Pub. L. 110–181), section 1071(a)(5) of the NDAA for FY 2015 (Pub. L. 113–291), section 813(a) of the NDAA for FY 2016 (Pub. L. 114–92), and most recently by section 865.

The DFARS implementation of this mandatory presumption has evolved accordingly to track the statutory changes, with the primary coverage found at paragraph (c) of DFARS section 227.7103–13, and paragraph (b) of the clause at DFARS 252.227–7037. There is no DFARS coverage applying such a presumption of development funding to commercial computer software because, as a matter of policy also dating back to the FASA time frame, the underlying procedures for challenging and validating asserted restrictions have not been applied to commercial computer software—only to noncommercial computer software (e.g., DFARS section 227.7203–13 and the clause at DFARS 252.227–7019).

II. Discussion and Analysis

Section 865 repeals the amendments to 10 U.S.C. 2321(f) made by the NDAA’s for FYs 2007 through 2016, which required that contractors take certain steps to demonstrate that they paid for the development of commercial items if their restrictions on technical data are challenged. Section 865 returns the presumption of development funding for commercial items to its original form, as established in 1994 by FASA. More specifically, FASA provided that when challenging asserted restrictions on technical data pertaining to a commercial item, DoD is required to presume that the contractor or subcontractor has justified the asserted restriction on the basis that the item was developed exclusively at private expense, regardless of whether the contractor or subcontractor submits a justification in response to the challenge notice. The challenge may be sustained only if DoD provides information demonstrating that the item was not developed exclusively at private expense. Section 865 restores this paradigm.

Therefore, DoD is considering changes that would return the DFARS coverage at 227.7103–13 and 252.227–7037 substantially back to its original FASA-implementing language with regard to the presumption. The changes would incorporate minor wording differences

due to slight changes in style and nomenclature over the years, such as referring to “the Contracting Officer” in lieu of “the Department.”

In addition to seeking public comment on the substance of the draft DFARS revisions, DoD is also seeking information regarding any corresponding change in the burden, including associated costs or savings, resulting from contractors and subcontractors complying with the draft revised DFARS implementation. More specifically, DoD is seeking information regarding any anticipated increase or decrease in such burden and costs relative to the burden and costs associated with complying with the current DFARS implementing language.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 227 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 227 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 2. Amend section 227.7103–13 by revising paragraph (c)(2) to read as follows:

227.7103–13 Government right to review, verify, challenge, and validate asserted restrictions.

* * * * *

(c) * * *

(2) *Commercial items—presumption regarding development exclusively at private expense.* 10 U.S.C. 2320(b)(1) and 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items—on the basis of development exclusively at private expense. Contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. When a challenge is warranted for a commercial item, a contractor’s or subcontractor’s failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

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**PART 252—SOLICITATION
PROVISIONS AND CONTRACT
CLAUSES**

- 3. Amend section 252.227–7037 by—
- a. In the clause heading, removing “(SEP 2016)” and adding “(DATE)” in its place;
- b. Revising paragraph (b); and
- c. In paragraph (c), removing “paragraph (b)(1)” and adding “paragraph (b)” in its place.

The revision reads as follows:

**252.227–7037 Validation of Restrictive
Markings on Technical Data.**

* * * * *

(b) *Commercial items—presumption regarding development exclusively at private expense.* The Contracting Officer will presume that the Contractor’s or a subcontractor’s asserted use or release restrictions with respect to a

commercial item is justified on the basis that the item was developed exclusively at private expense. The Contracting Officer will not challenge such assertions unless the Contracting Officer has information that demonstrates that the commercial item was not developed exclusively at private expense.

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